

**STATE OF SOUTH DAKOTA
DEPARTMENT OF LABOR AND REGULATION
DIVISION OF LABOR AND MANAGEMENT**

AFSCME, COUNCIL 59,

HF No. 1E, 2012/13

Petitioner / Respondent,

v.

DECISION

CITY OF MITCHELL, SOUTH DAKOTA,

Respondent / Petitioner.

City of Mitchell filed a Petition to Amend Unit Certification on July 6, 2012, pursuant to ARSD 47:02:02:02. AFSCME Council 59 filed an Answer to the Petition and filed a Cross-Petition. City of Mitchell answered AFSCME's Petition. The Department provided a Hearing under ARSD 47:02:02:17 that was held on January 24, 2013 at the Mitchell City Hall, Council Chambers. AFSCME was represented by Mr. Matt Miller. The Respondent was represented by Mr. Dennis Maloney. Each of the parties had an opportunity to present their case to the Department through evidence and witnesses. Witnesses testifying at hearing were: Lyndon Overweg, Dick Figlund, Becky Handrahan, and Billie Kelly. Oral Argument was given by the parties at the close of testimony. The Department having been fully advised in the premises makes this Decision and Order.

ISSUE

Whether the positions of Cemetery Sexton and Traffic Supervisor should be included or excluded from the City of Mitchell's AFSCME public employee unit?

FACTS

AFSCME, Council 59 is the public employee union which represents a unit comprised of all general employees that work for the City of Mitchell excluding Police, Fire, and Management employees. This unit was certified by the Department on or about February 20, 2009. Pursuant to SDCL §60-9A-7, the certification of the unit occurred over one year prior to the City of Mitchell making this request for an amendment of the unit. At that time the position of Cemetery Sexton was not included in the unit and the position of Traffic Supervisor was included in the unit.

The position of Traffic Supervisor is held by Dick Figlund. He has been on the job since 1994. The position is in charge of the Traffic Division and supervises one full-time permanent employee and summer help. The position is responsible for the interviewing and hiring and discipline of the employees within the Division. The traffic

supervisor is responsible for going to City Supervisor meetings. These meetings are confidential and involve management and personnel issues. The traffic supervisor schedules the division employees and approves all overtime and vacation. Since the unit certification in 2009, the traffic supervisor has also been put in charge of the GIS mapping of the city utilities and signage.

Because of the new added duties of GIS mapping, the traffic supervisor is also responsible for marking underground utilities placed by the City in areas that may be under construction. Each day, the South Dakota one-call system e-mails the traffic supervisor a list of locations within the City of Mitchell to mark underground hazards placed by the City of Mitchell.

The position of Cemetery Sexton was fully considered by the Department in 2009 and it was determined that the duties of the position were managerial in nature. The job description for the Cemetery Sexton has not changed since 2009. The position is currently held by Becky Handrahan and has been since 1984. The Cemetery Sexton is in charge of all record keeping, selling of cemetery lots, upkeep and general maintenance of the cemetery and making sure someone is available to work on the days that a burial occurs. The position has one full-time, permanent subordinate and some summer help. The position schedules the subordinate and the summer help.

Testimony indicates that the Sexton position was recently given the authority to give performance evaluations to summer help. This ability to give performance evaluations to her full-time subordinate is part of the job description. Many parts of the job description are supervisory in nature although the actual practice of supervision is not allowed by the position's direct supervisor, Kevin Thurman, the head of the golf/cemetery division. Mr. Thurman was not present at hearing to explain why the Cemetery Sexton is not allowed to perform the duties for which she is assigned.

ANALYSIS AND DECISION

Administrative rules have been promulgated by the secretary of labor, pursuant to SDCL 3-18-6, that give requirements for filing a petition for bargaining unit determination or redetermination. The Petition to Amend Unit Certification is legally sufficient for the Department to determine whether certain members belong in the current bargaining unit.

SDCL §3-18-1 defines "public employees." The pertinent parts of the statute are set out here:

The words "public employees" as used in this chapter shall mean any person holding a position by appointment or employment in the government of the State of South Dakota or in the government of any one or more of the political subdivisions thereof, or in the service of the public schools, or in the service of any authority, commission, or board, or any other branch of the public service. The term does not include:

- (1) Elected officials and persons appointed to fill vacancies in elective offices and members of any board or commission;
- (2) Administrators except elementary and secondary school administrators, administrative officers, directors, or chief executive officers of a public employer or major divisions thereof as well as chief deputies, first assistants, and any other public employees having authority in the interest of the public employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other public employees, or the responsibility to direct them, or to adjust their grievances, or to effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;

...

This section does not preclude employees described in subdivisions (1) to (7), inclusive, from joining professional, noncollective bargaining organizations.

Public employees are eligible for membership in a public employee union. The statute for defining an appropriate unit is SDCL 3-18-4, which states:

When a governmental agency declines to grant formal recognition or when a question concerning the designation of a representation unit is raised by the governmental agency, labor or employee organization, or employees, the department of labor or any person designated by it shall, at the request of any of the parties, investigate such question and, after a hearing if requested by any party, rule on the definition of the appropriate representation unit. The department shall certify to the parties in writing the proper definition of the unit. **In defining the unit, the department shall take into consideration**, along with other relevant factors, the principles of efficient administration of government, the principles and the coverage of uniform comprehensive position classification and compensation plans in the governmental agency, the history and extent of organization, occupational classification, **administrative and supervisory levels of authority**, geographical location, and the recommendations of the parties.

SDCL § 3-18-4. The South Dakota Supreme Court in the case *Appeal of the City of Aberdeen*, 270 NW2d 139, 141 (SD 1978) said, “[w]e do not construe the statute to require that there necessarily be evidence in the record before the [Department] as to each factor nor that a separate finding must invariably be made by the [Department] as to each factor.” *Id.* The factors listed in §3-18-4 are not exclusive. Other factors not listed above, may be relevant in the determination of whether certain employees are appropriate members of a unit.

The facts indicate that the two positions in question both have supervisory authority granted to them in the job descriptions. Both positions are required to use independent judgment in making decisions. Both positions, although not able to hire or fire may make

recommendations as such to the City Commission. This ability to supervise and make recommendations regarding the people they supervise is not merely clerical, but requires the use of independent judgment. The test is not whether the person holding the job makes these judgments on a regular basis, but whether their job description gives the person the ability to do so.

Based upon the facts presented by the Parties, the positions of Cemetery Sexton and Traffic Supervisor are excluded from the public employees union. The makeup of the union does not contain other supervisors and it is a collective bargaining unit. Under SDCL 3-18-1, supervisors are not considered to be "public employees" and are excluded under the definition of the Collective Bargaining Unit for the City of Mitchell.

The Petition to Amend Unit Certification is Granted in favor of the City of Mitchell. The Petition by AFSCME to Amend Unit Certification is Denied.

Counsel for City of Mitchell shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision, within 10 days of the receipt of this Decision, as well as any Proposed Findings of Fact and Conclusions of Law. Representative for AFSCME may submit proposed Findings of Fact and Conclusions of Law within 10 days after receipt of City of Mitchell's submission. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for City of Mitchell shall submit such stipulation together with an Order consistent with this Decision.

Dated this 22nd day of February, 2013.

SOUTH DAKOTA DEPARTMENT OF LABOR and REGULATION

Catherine Duenwald
Administrative Law Judge